(12)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 970

RICHTER'S BAKERY, *Petitioner*

Vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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FORT WORTH BRIEF PRINTING CO., 208 1-2 W. 13TH ST. 3-4076

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Richter's Bakery, a Texas corporation, respectfully petitions this honorable court for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Fifth Circuit enforcing an order of the National Labor Relations Board against it.

STATEMENT

This is an original proceeding filed by the National Labor Relations Board to enforce an order issued by it against this petitioner on August 24, 1942 (R. 161).

Petitioner is and was at all of the times involved engaged in the manufacture, sale, and distribution of bread and rolls in San Antonio, Texas, and its trade

territory wholly within the State of Texas. Its products are consumed locally and none of them is supplied, delivered or transported in interstate commerce. A part of the raw materials which it uses come from sources outside the State of Texas.

Petitioner contended in the proceedings before the Board and in the Circuit Court of Appeals and here contends that it is not subject to the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449, 29 U. S. C. 151 et seq.)

The opinion of the Circuit Court of Appeals was delivered February 8, 1944 (R. 223) and judgment enforcing the Board's order was rendered that day as reflected by the minutes of the Court (R. 229) Petition for rehearing was filed February 28, 1944 (R. 230) and denied on March 1, 1944 (R. 235) The decree was entered March 14, 1944 (R. 235)

BASIS OF JURISDICTION OF THIS COURT

It is contended that this court has jurisdiction to review the aforesaid judgment and decree under Section 240 of the Judicial Code as amended (28 U. S. C. 347).

THE QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court below erred in not holding that the labor relations of petitioner are beyond the power of Congress to regulate.

2. Whether the Court below erred in holding that

by the mere fact that petitioner used materials that came from outside the State of Texas in an amount in excess of that to which courts would apply the maxim de minimis petitioner was made subject to the National Labor Relations Act.

3. Whether the Court below erred in applying the maxim de minimis.

4. Whether the Court below erred in not holding that the applicability of the Act to petitioner is dependent upon a showing that there was such a *close* and *substantial* relation between the business of petitioner and interstate commerce as to bring petitioner within the scope of federal regulation under the National Labor Relations Act.

5. Whether the court below erred in not holding that the business of petitioner did not affect interstate commerce within the meaning of the National Labor Relations Act, there being no showing that there was a *close* and *substantial* relation between the business of petitioner and interstate commerce.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court. The questions presented are of great importance to the vast body of intrastate businesses which draw on sources outside of the state in which they operate for a part of the commodities with which they deal.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued herein to the United States Circuit Court of Appeals for the Fifth Circuit; that upon a review of the judgment and decree of said court the same be reversed; and that it be granted such other and further relief as in the premises may be necessary or proper.

RICHTER'S BAKERY, *Petitioner*
J. C. HALL,
A. V. KNIGHT,
KARL H. MUELLER,

By_____
Attorneys for Petitioner.

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

RICHTER'S BAKERY, *Petitioner*

Vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Subject Index and Table of Cases

A subject index covering this brief and a table of cases precede the foregoing petition for writ of certiorari.

The Opinion Below

The opinion of the Circuit Court of Appeals which was handed down on February 8, 1944, is reported in 140 F. 2d 870 (Advance Sheets, April 17, 1944) and is printed in the record herein (R. 223).[1]

Jurisdiction

The statutory provision which is believed to sustain the jurisdiction of this court is Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

[1]The certified record of the Circuit Court of Appeals filed herein consists of Volume I Transcript of Record which will be referred to as (R. .....); Appendix to Petitioner's (Board's) Brief and Appendix to Respondent's (Richter's) Brief which will be referred to as (B. A.....) and (R. A.....), respectively.

The cases believed to sustain said jurisdiction are as follows:

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1; 57 S. Ct 615; 81 L. Ed. 893, and companion cases.

Statement

The facts material to the consideration of the questions presented are these:

Petitioner is a Texas corporation, engaged in San Antonio, Texas, in the manufacture of bread and rolls (B. A. 21, 38). All of its products were and are sold and consumed locally and wholly within the State of Texas (R. A. 11). During the year ending February 28, 1942, petitioner used raw materials aggregating in value $236,968.18 of which more than 25 percent valued at $60,150.13 came from sources outside the state (B. A. 19-20, 304-307). The volume of out of state purchases had decreased to 11 or 12 percent by April 27, 1942 (R. A. 37-38). Out of state purchases were made either from a local salesman or broker for the seller. Petitioner did not transport any of the commodities so purchased (R. A. 15).

The National Labor Relations Board contended that petitioner's business together with certain other business constituted a "single integrated enterprise". However, that inference and contention did not contribute to the decision of the court below and it expressed no opinion with respect to it (R. 225).

Specification of Error to Be Urged

If this Court issues the writ of certiorari to review the judgment and decree below, it will be urged that the Circuit Court of Appeals erred in the following respects:

(1) In not holding that the labor relations of petitioner are beyond the power of Congress to regulate.

(2) In holding that by the mere fact that petitioner used materials that came from outside the State of Texas in an amount in excess of that to which courts would apply the maxim de minimis petitioner was made subject to the National Labor Relations Act.

(3) In applying the maxim de minimis.

(4) In not holding that the applicability of the Act to petitioner is dependent upon a showing that there was such a *close* and *substantial* relation between the business of petitioner and interstate commerce as to bring petitioner within the scope of federal regulation under the National Labor Relations Act.

(5) In not holding that the business of petitioner did not affect interstate commerce within the meaning of the National Labor Relations Act, there being no showing that there was a *close* and *substantial* relation between the business of petitioner and interstate commerce.

Argument

Petitioner respectfully contends that the holding of the Circuit Court of Appeals is in conflict with the following principles enunciated by this court which rule the questions here presented:

The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system, otherwise there would be virtually no limit to the Federal power, and for all practical purposes we should have a completely centralized government.

A. L. A. Schechter Poultry Corporation v. United States of America, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837.

If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people; and the authority of the State over its domestic concerns would exist only by sufferance of the Federal government.

Schechter v. United States of America, supra.

The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several states" and the internal concerns of a State. The distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615.

Although activities may be intrastate in character when separately considered, if they have such a *close and substantial* relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

National Labor Relations Board v. Jones & Laughlin Steel, Corp., supra.

Where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a *close and substantial* relation to interstate commerce in order to justify federal intervention for its protection. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains.

Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453, 466, 82 L. Ed. 955, 960, 58 S. Ct. 656.

The material jurisdictional facts are uncontroverted. Petitioner is engaged in a purely local intrastate business. No interstate business is directly dependent upon it. The only way in which it could affect interstate commerce would be indirectly in connection with its purchases from time to time of some commodities which move to it in interstate commerce.

There is no evidence to show or from which it can be inferred that the relation of petitioner's business to interstate commerce is close or substantial. It is re-

spectfully contended that such a showing is a condition precedent to holding petitioner's labor relations subject to federal regulation under the National Labor Relations Act.

The court below in holding petitioner subject to the Act because its out of state purchases exceeded a few dollars has erroneously sought to substitute the rule of de minimis for the test of closeness and substantiality. The maxim de minimis is applicable to cases involving businesses engaged in interstate commerce. It is not applicable to purely local intrastate businesses such as petitioner's.

Petitioner's relation to interstate commerce is no different from that of thousands upon thousands of local industries and business enterprises. It would be difficult if not impossible to find any purely local business that does not make out of state purchases of one kind or another in an amount in excess of that to which the courts would apply the maxim de minimis. It is manifest that if the holding of the Court below were permitted to stand the National Labor Relations Board would have jurisdiction over every corner grocery and every general store at the forks of the creek from the Atlantic to the Pacific. The distinction which this court has said is fundamental and essential to the maintenance of our constitutional system would be destroyed. There would be virtually no limit to the Federal power, and for all practical purposes we would have a completely centralized government all in contravention of the constitution and the decisions of this court.

It is respectfully submitted that the questions here involved are of such far-reaching effect and importance that this Court should issue the writ of certiorari and review and reverse the decision of the Court below.

J. C. HALL,
A. V. KNIGHT,
KARL H. MUELLER,
Attorneys for Petitioner.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449; 29 U. S. C. 151 et seq.) are:

Sec. 152 (6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Sec. 152 (7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Sec. 160 (a) Powers of Board Generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 970

RICHTER'S BAKERY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 223–229)[1] is reported in 140 F. (2d) 870. The findings of fact, conclusions of law, and order of the Na-

[1] For the convenience of the Court, the method of referring to the record adopted by petitioner is used throughout this brief. Thus, the record certified by the Circuit Court of Appeals entitled "Volume I, Transcript of Record" and containing the complaint, Trial Examiner's Intermediate Report, the Board's Decision and Order, the opinion and decree of the court below, and other papers will be referred to as "R"; and the volumes entitled "Appendix to Petitioner's Brief" and "Appendix to Respondent's Brief" filed in the court below will be referred to as "B. A." and "R. A.," respectively.

tional Labor Relations Board (R. 65–112, 161–169) are reported in 46 N. L. R. B. 447.

JURISDICTION

The decree of the court below (R. 235–238) was entered on March 14, 1944. A petition for rehearing, filed by petitioner on February 28, 1944 (R. 230–234), was denied on March 1, 1944 (R. 235). The petition for a writ of certiorari was filed on May 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the unfair labor practices of a bakery selling all of its products within a State but obtaining raw materials valued at more than $60,000 annually from sources outside the State and closely associated, through its ownership and management, with other bakeries which purchase raw materials valued at more than $220,000 annually from sources outside the State, affect commerce within the meaning of Section 2 (6) and (7) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 11.

STATEMENT

Upon the usual proceedings, the Board, on December 20, 1942, found that petitioner had engaged in certain unfair labor practices affecting commerce and entered the order whose enforcement was decreed by the court below (R. 161–169). The Board's findings concerning the applicability of the Act to petitioner may be summarized as follows:

Petitioner is a Texas corporation engaged at San Antonio, Texas, in the production, sale, and distribution of bread, rolls, and buns (R. 65; B. A. 21, 38). Its corporate stock is equally divided between four Richter brothers and their mother (R. 65–66; B. A. 8). The four brothers are also equal owners of the stock of two other bakery corporations in Texas located at Corpus Christi and Austin, respectively (R. 66; B. A. 8–9, 38, 141). In addition, the brothers and their mother own 80 percent of the stock in a fourth corporation, The Colonial Cake Company (herein called Colonial), which makes cakes and sweet goods and which is located in San Antonio, Texas (R. 66; B. A. 9–10, 38–39, 141). The brothers hold all the offices in each corporation except the office of vice president of Colonial, and each brother maintains his headquarters at petitioner's plant (R. 66; B. A. 7–10, 14–15, 131, 160).

Not infrequently, personnel is shifted from plant to plant, and when a strike was called at petitioner's plant in August 1941, a number of employees from the Corpus Christi bakery and one from the Austin bakery replaced strikers (R. 67; B. A. 27, 28, 31, 36, 139, 169, 170, 191, 253–254). One auditor with an office at petitioner's plant has general supervision over the books of each corporation (R. 67; B. A. 2, 6–7, 29–30, 132–134). He or petitioner's president purchases substantially all raw materials used by petitioner and the Corpus Christi and Austin bakeries (R. 67; B. A. 4–5, 22). Often these materials are purchased by carload lots and delivery is effected by having the freight car make three stops—at Austin, San Antonio, and Corpus Christi—to deliver consignments to each plant (R. 67; B. A. 22–23). Petitioner sells annually to Colonial, the Austin bakery, and the Corpus Christi bakery raw materials valued at about $4,700 (R. 67; B. A. 23–24). Within their respective territories, the other three Richter concerns are the distributors of all of Colonial's products not sold directly by Colonial to retail vendors (B. A. 18–19, 137–138). Petitioner alone distributes about $50,000 worth of Colonial's products annually (B. A. 32).

Together, the Richter concerns constitute one of the largest baking enterprises in Texas (R. 68;

B. A. 36). Their purchases of raw materials for the year ending February 28, 1942, exceeded $719,000 in value, and more than 30 percent of this amount, over $220,000 worth, was shipped to them from points outside the State of Texas (R. 68; B. A. 19–21, 303).

Petitioner alone, during the year ending February 28, 1942 (the period during which most of the unfair labor practices occurred), purchased raw materials valued at $238,968.18, of which more than 25 percent, valued at $60,150.13, came from points outside the State (R. 68; B. A. 19–20, 304–307).[2] These out-of-State purchases consisted of 103 separate transactions with vendors in 11 different States from New York to California (R. 68; B. A. 304–307).

Upon the basis of the above facts, the Board concluded that petitioner's unfair labor practices affected commerce within the meaning of Section 2 (6) and (7) of the Act (R. 112).

On January 9, 1943, the Board filed in the court below a petition for enforcement of its order

[2] Petitioner, in an apparent attempt to avoid the Board's jurisdiction, had reduced its out-of-State purchases to 11 or 12 percent of its total purchases by the date of the hearing before the Board (R. 68; R. A. 37–38, B. A. 230, 235). It had also conditioned its sale of bread to a company transporting laborers out of the State on an agreement by that company that all bread purchased by it would be consumed before the train on which the laborers were riding left the State of Texas (R. 68–69; B. A. 229–230, 318).

(R. 2–7). Thereafter, on February 8, 1944, the court handed down its decision (R. 223–229) and entered its decree (R. 235–238) enforcing the Board's order.

ARGUMENT

Petitioner's contention that it is not subject to the Act is without merit. The court below, upon a careful consideration of the facts, concurred in the Board's ruling maintaining its jurisdiction (R. 224–226). That decision is not, as petitioner contends, "probably in conflict with applicable decisions of this court" (Pet. 3), nor is it in conflict with any decisions of the circuit courts of appeals.

The test of the Act's application, as announced by this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 41–42, is whether petitioner's business has "such a close and intimate relation to interstate commerce" that a "stoppage of * * * operations by industrial strife" would interfere with the free flow of goods in their normal channels in interstate commerce. This test is fully met in the instant case whether petitioner's operations be considered alone or in conjunction with the other three Richter bakeries.

Considering petitioner's business alone, as the court below seems to have done (R. 225), it is plain that a stoppage of petitioner's operations by

industrial strife would directly and immediately remove from the flow of interstate commerce a substantial volume of goods valued at more than $60,000 annually (*supra*, p. 5). This volume plainly exceeds "that to which the courts would apply the maxim *de minimis.*" *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607. The courts have uniformly sustained the jurisdiction of the Board in cases involving the flow of even less goods in commerce. *National Labor Relations Board* v. *White Swan Co.*, 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, 314 U. S. 648; *National Labor Relations Board* v. *Central Missouri Telephone Co.*, 115 F. (2d) 563 (C. C. A. 8); *National Labor Relations Board* v. *Pearlstone Co.*, 115 F. (2d) 132 (C. C. A. 8); cf. *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275, 280–281 (E. D. N. Y.); *Lewis* v. *Nailling*, 36 F. Supp. 187 (W. D. Tenn.). It is not material that only 25 percent of petitioner's total purchases moved in interstate commerce, for the provisions of the Act "cannot be applied by a mere reference to percentages." *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 467; see also *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 589 (C. C. A. 9); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 543–544 (C. C. A. 10); *National Labor Relations Board* v.

Cowell Portland Cement Co., 108 F. (2d) 198, 201 (C. C. A. 9).[3]

The amenability of petitioner to the jurisdiction of the Board, however, is not dependent upon the amount of interstate business done by petitioner alone. In view of the substantial identity of ownership and control of the other three Richter concerns and petitioner, the close connection between the operations of each, and the not infrequent interchange of personnel among them (*supra*, pp. 3–4), a labor dispute at petitioner's plant would have repercussions in the other plants. Petitioner's interference with or denial of the rights of its employees to self-organization and collective bargaining would necessarily bring home to the employees of the other Richter concerns the realization that their own attempts to organize and bargain collectively might likewise be resisted and would immediately threaten the interstate movement of large quantities of goods (about $160,000 worth annually; see *supra*, pp. 4–5), for which these related concerns are also responsible.

[3] Nor is it relevant, as petitioner seemingly contends (Pet. 6), that none of the products sold by it moved in interstate commerce or that its purchases from out-of-State sources were made through local salesmen or brokers for the seller. It is pertinent only that a substantial amount of goods move in interstate commerce and that a cessation or interruption of their movement by industrial strife would affect the steady flow of that commerce. *Santa Cruz Fruit Packing Co.*

The Board was not deprived of jurisdiction in this case, as petitioner apparently contends (Pet. 6), because the volume of petitioner's interstate purchases had been reduced to 11 or 12 percent of its total purchases by April 27, 1942, the date of the hearing before the Board. The fact that petitioner may have reduced its interstate business or even ceased to operate altogether cannot affect the Board's jurisdiction to remedy unfair labor practices which, when committed, affected interstate commerce within the meaning of the Act. Petitioner is still a going concern and it may resume the scope of its former interstate operations at any time. *Southport Petroleum Co.* v. *National Labor Relations Board,* 315 U. S. 100; *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.,* 133 F. (2d) 295, 300 (C. C. A. 6). Moreover, despite the curtailment, a cessation of petitioner's operations would still affect a substantial volume of interstate commerce larger than that to which the term "*de minimis*" may be applied. Goods valued at approximately $27,000 annually flowing from without the State directly to petitioner's plant and the substantial interstate purchases of the affiliated companies would still be threatened with interruption or curtailment by industrial strife at petitioner's plant.

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v. *National Labor Relations Board*, 303 U. S. 453, 463; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 605; cf. *Wickard* v. *Filburn*, 317 U. S. 111, 125.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. sec. 151 *et seq.*) provide:

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

U. S. GOVERNMENT PRINTING OFFICE: 1944